Argued by
BENJAMIN S. KIRSH,
SUSAN BRANDEIS.

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

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JOSEPH P. MARGOLIN,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR THE PETITIONER.

BENJAMIN S. KIRSH,
Attorney for Petitioner.

BENJAMIN S. KIRSH,
SUSAN BRANDEIS,
of Counsel.

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IN THE

Supreme Court of the United States

JOSEPH P. MARGOLIN, Petitioner, —against— UNITED STATES OF AMERICA, Respondent.	No. 858.

BRIEF FOR THE PETITIONER.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit in the above entitled cause. It presents for consideration the construction and constitutionality of the amendment of the War Risk Insurance Act of May 20th, 1918, 40 Stat., 555, appearing on pages 12-13 of this brief.

PRELIMINARY STATEMENT.

The petitioner, an attorney at law of New York City, was convicted in the United States District Court for the Southern District of New York, for charging a fee in excess of $3.00 "in the preparation and presentation to the United States Veterans Bureau of an affidavit" (Side Page 1), executed by a beneficiary under a War Risk Insurance Policy, in alleged violation of the Act of May 20th, 1918, 40 Stat., 555. The Circuit Court of Appeals for the Second Circuit, while assuming that the professional work of the petitioner was "of substantial service in procuring an allowance of

Yetta Cohen's claim, and under any appraisal was worth many times the sum of $3.00" (S. P. 98) affirmed the judgment of conviction.

The Circuit Court of Appeals stated in its opinion (S. P. 99):

> "The learned trial Judge must be taken as construing the statute not only to forbid the defendant charging more than three dollars for actually preparing and executing the claim papers, but also to forbid him charging anything whatever for such preliminary services as in fact he rendered, and the conviction cannot stand unless this is the proper view."

And again (S. P. 99):

> "The learned trial Judge, was, therefore, right in saying that the defendant might recover nothing over $3.00 for all the services rendered Yetta Cohen."

This decision is in direct conflict with the construction of the statute announced by Judge William E. Baker, United States District Judge for the Northern District of West Virginia, in the case of *United States vs. Rodgers,* filed on or about November 14th, 1922, at Elkins, West Virginia. We do not find this case reported, and we are, therefore, attaching the opinion to our brief at page 77.

In the *Rodgers* case, the Court directed a verdict of acquittal on the ground that the criminal prohibition of the statute against receiving a greater sum than $3.00, applied solely to the clerical work of filling in the affidavit of claim, and did not apply to a case where elaborate and important in-

vestigation work was necessary to establish the existence and validity of the claim.

The petitioner stands convicted of a crime in New York for acts which have been considered guiltless in West Virginia.

That the restriction against the receipt by an attorney of a greater sum than $3.00, *set forth in the statute, applies solely to the clerical work of filling out the form or affidavit of claim, appears indisputably from the Report of the House Committee on Interstate and Foreign Commerce, No.* 471, 65*th Congress, Second Session, which was adopted by the Report of the Senate Committee on Interstate Commerce, No.* 429, 65*th Congress, Second Session, and the communication of the Secretary of the Treasury, Mr. McAdoo, incorporated in these Reports, in recommending passage of the bill, H. R.* 11245, 65*th Congress, Second Session, which, upon passage, became the law now under consideration.*

The House Report, *supra*, which we discuss fully in Point I of our brief, contains the following unmistakable language:

> "As a fee for the preparation of papers which the Bureau will send these people, the Committee has fixed the maximum fee of $3.00 which we believe is ample for the work that is necessitated in filling out these papers."

The opinion below makes no reference to these Committee Reports. It seems apparent that the Court did not have the advantage of the views therein expressed, as its opinion plainly ascribes to the words of the statute "for such assistance as may be required in the *preparation and execution of the necessary papers*" a comprehensive content which the Committee Report establishes, beyond controversy, was not within the intention of the framers of the Statute.

THE QUESTIONS INVOLVED.

1. Is it a criminal offense under the Act of May 20th, 1918, 40 Stat., 555, for an attorney at law to receive a fee greater than $3.00, for all professional services rendered by him, short of obtaining a judgment in an action in a District Court of the United States, irrespective of quantity, difficulty, and utility, in the investigation of the facts and the establishment of the existence and validity of a contract claim under a War Risk Insurance Policy?

2. If the Act of May 20th, 1918, be construed so as to render criminal the receipt by an attorney of a sum in excess of $3.00 for elaborate and useful investigation and preparatory work, and all other services short of obtaining a judgment in the United States District Court, under a War Risk Insurance Policy, and to nullify a contract between client and attorney to pay an adequate and reasonable fee in the collection of a claim arising under a contract of insurance, and not in the collection of a pension or gratuity, is it an arbitrary, oppressive enactment, and a deprivation of the liberty and property of an attorney, in violation of the Fifth Amendment of the Constitution of the United States?

FACTS.

The petitioner, an attorney at law, was convicted of a violation of the Act of May 20th, 1918, 40 Stat., 555, for receiving a sum in excess of $3.00 for services performed by him "in the preparation and presentation to the United States Veterans Bureau of an affidavit," executed by a beneficiary

under a War Risk Insurance Policy (S. P. 1). In view of the statement in the opinion of the Circuit Court of Appeals that the services were substantial, resulted in procuring the allowance of the client's claim, and under any appraisal were worth many times the sum of $3.00 (S. P. 98), an extended review of the undisputed testimony adduced at the trial becomes unnecessary. The facts prove a hiring of an attorney by a client and services rendered by the attorney from a period commencing in December, 1922, and not terminating before April, 1923. The professional services rendered by the petitioner included numerous conferences, communications, a trip to Washington from New York, elaborate investigation there, and the discovery, by virtue of the attorney's effort and energy, of the proof necessary to establish and recover a claim for $9,000.00, which will, with interest, amount to the sum of $12,360.00. The compensation for professional services likewise included railroad expenses, hotel expenses, and miscellaneous disbursements. The fee was fixed on a contingent basis, with no recovery if no successful result was attained.

A visualization of the exact facts will, however, bring out into bold relief the severity and injustice of the construction of the Act for which the Government contends. It was readily conceded by the Government upon the trial that the petitioner's client, an aunt of the insured, did not know positively at the time she engaged the petitioner, whether the insured had died (S. P. 42). After numerous inquiries by correspondence, the petitioner had received, in reply, the following letter, marked "Exhibit B", appearing on the last page of the record, and which reads as follows:

"WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON

AG 201 Freeman, Joseph, (12-22-22) WWD

Dec. 29, 1922.

Joseph B. Margolin,
Attorney and Counselor at Law,
51 Chambers Street,
New York City, N. Y.

Dear Sir:—

With reference to your communication of December 22, 1922, requesting that you be furnished with a report showing the present status of Private Joseph Freeman, #47,300, formerly Company G, 18th Infantry, also whether or not he carried War Risk Insurance and the beneficiaries thereunder, you are advised that the latest official report received relative to this soldier shows him as having been wounded in action July 21, 1918.

A thorough and exhaustive investigation of this case has been made, but sufficient evidence has not been obtained to enable this office to determine the final status of this soldier. Until such evidence has been received the War Department can take no action towards completing the records of Private Freeman.

For any information concerning Government Insurance, communication should be addressed to the Director, U. S. Veteran's Bureau, Washington, D. C., to whose Bureau this matter pertains.

Very truly yours,

Robert C. Davis,
The Adjutant General."

(Italics ours.)

There is no question, furthermore, that the petitioner was engaged by the client prior to the preparation of the affidavit of claim (S. P. 62), and that after receipt of the above letter, the petitioner went to Washington at the client's request (S. P. 66). Although the testimony shows that another attorney had already been engaged, and apparently four years had elapsed since the death of Private Freeman, efforts to collect the proceeds of the policy which the client claimed, had been fruitless.

The proof showed that nothing was charged by the petitioner for the mere filling in of the details of the affidavit (S. P. 70), and that the petitioner did not take the acknowledgment of the papers (S. P. 70). It was not even intimated in the proof that the petitioner sought employment or appeared in any other veterans' claims cases.

In addition to the criminal penalties of the statute, another serious consequence has resulted from the petitioner's conviction. Counsel have been informed by the petitioner that in view of the petitioner's conviction, the Grievance Committee of the Association of the Bar of the City of New York has been compelled to institute disciplinary proceedings against him.

Since this Court has granted a writ of certiorari in this cause, such disciplinary proceedings have been held in abeyance pending the review of this case by this Court. The petitioner now stands convicted of a crime against the United States, and the stigma of a conviction in the criminal courts has led to the loss of the confidence of his clients, and an almost entire destruction of his professional practice.

REASONS FOR REVERSING THE JUDGMENT OF CONVICTION AND A DISMISSAL OF THE INDICTMENT.

1. The Committee Reports conclusively establish that the language of the Act "Provided, however, That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3.00 in any one case", applies solely to the mere filling in of the form or affidavit of claim.

2. This criminal statute must be strictly construed against the Government, and liberally in favor of the petitioner:

(A.) Thus construed the language of the Statute "that no claim agent or attorney shall be recognized in the *presentation* or *adjudication* of claims" under Articles 2, 3 and 4, except in case of judgment obtained after action to recover the proceeds of a contract of insurance, does not make a charge for elaborate and useful investigation work a criminal offense. No claim agent or attorney *"shall be recognized"* cannot possibly be stretched to mean *"shall be criminal."* **"Shall be recognized" is merely a lack** of power to represent, and not an expression of prohibited conduct rendered criminal when performed. The word "presentation", evidently, as the context of the Act shows, refers to the physical filing of the affidavit of claim or sending the same enclosed in the attorney's letter. The word "adjudication" seems to refer to a settlement, or a trial at law, in an action upon a contract of insurance.

If the term "adjudication" refers to settlement or compromise of the claim without resort to court proceedings, and even after suit, prior to judgment therein, it presents a grave question of constitutionality, which we consider in Point X of this brief. In any event, the terms are "presentation" and "adjudication", and not "investigation," "preparation" or words of similar import.

(B.) Nor does the language of the statute which in substance prohibits the charge of any fee or compensation "except as herein provided", in view of the form of the statute and the prior legislation upon the same subject matter, include a limitation upon a fee for services not "herein provided." Services for elaborate and successful investigation and preliminary work, not provided for within the statute, are not within the criminal prohibition of the Act. The wording "except as herein provided" cannot be divorced from the entire context of the statute. "Except as herein provided" means merely a "charge for particular services therein specified in excess of the limitations therein fixed." (Baker, J., in *United States vs. Rodgers*, Point XII of this brief.)

3. Meaning must be given to every portion of the Statute. The construction sought to be placed upon the Act by the Government will render it repugnant and contradictory, and must be avoided. The Court is under a duty to announce a harmonious and consistent construction of the entire Act.

4. Even if the petitioner should be deemed to fall within the strict letter of the Statute, the Government is faced with the dilemma that the Statute must not be construed so as to have an unreasonable, unjust, and absurd application. The

spirit of the law must prevail over the letter. The evil to be remedied by the prohibitions of the Act of May 20th, 1918, was the scandalous practice of fraudulently exacting large sums of money for nominal services, described in Point I of this brief. It was not contemplated by Congress that attorneys should be restricted to $3.00 for honest, useful, and bona fide investigation work done in connection with the collection of proceeds of a contract of insurance.

5. The absurdly disproportionate severity of the penalty to the acts for which the petitioner stands convicted, must cause the Court to pause before deciding that the statute was intended to prohibit the acts which the petitioner performed in behalf of his client and at her request.

6. The contrast of the language of the Act of May 20th, 1918, to the clear, explicit and comprehensive prohibitions contained in the language of the prior enactments, is strong evidence of a definite change of legislative policy. A less rigorous prohibition of acts made criminal, and different standards of criminality, are progressively announced in the Acts of June 12, 1917, October 6th, 1917, and May 20th, 1918.

7. The inconsistent charges of the trial Judge to the jury, and the inconsistent verdict of the jury, in finding the petitioner guilty under the first count and acquitting him under the second, clearly portray the confusing terms in which the Statute is couched, and the practical difficulties in administering it.

8. There is a total failure to prove the specific charges of this particular indictment. There is absolutely no evidence that the petitioner charged any sum in excess of $3.00 for the "preparation" of

the form, and there is absolutely no proof at all that the petitioner "presented" the form, within the meaning of the Statute.

9. If a statute is reasonably susceptible of two interpretations, one presenting grave and doubtful constitutional questions, and the other avoiding such questions, the Court is under a duty to adopt the latter construction.

10. If the Act of May 20, 1918, is to be construed so as to make criminal the receipt by an attorney of a sum in excess of $3.00 for any professional services all short of obtaining an actual judgment, without regard to quantity and success, and to invalidate an agreement on the part of the client to compensate the attorney adequately and justly for honest, useful, and successful service, in the collection of the proceeds of a contract of insurance and not a pension or gratuity, it is arbitrary, oppressive, and destructive of the liberty and property of the petitioner, in violation of the 5th Amendment of the Constitution of the United States.

11. The opinion of the Circuit Court of Appeals erroneously construes the Statute. It also contains an erroneous statement of facts, that the claim of the beneficiary in this case was for compensation. The fact is that it was under a contract of insurance.

12. Judge Baker's opinion in the case of *United States vs. Rodgers*, attached at page 77 of this brief, is well considered, sound, and announces a rule of law, which is sensible and reasonable in its application.

THE STATUTES UNDER CONSIDERATION.

The Act of May 20th, 1918, 40 Stat. 555, under which the petitioner was convicted, reads as follows:

> "Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, *shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes*, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. *The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act*, the forms of application of those claiming to be entitled to such benefits, *the methods of making investigations* and medical examinations, and the manner and form of adjudications and awards: *Provided, however*, That payment to any at-

torney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3.00 in any one case: *And provided further* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment." (Italics ours.)

(Section 2 of the above Act repealed section 405 of the Act of Oct. 6, 1917.)

Before the above amendment, section 13 of the Act of October 6, 1917, 40 Stat. 398, read as follows:

"That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, *and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections 5 and* 405. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise require, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. *The director shall adopt reasonable and proper rules to govern the procedure of the divisions, to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles 2, 3, and 4, and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act*, the forms of application of those claiming to be entitled to such benefits, *the method of making investigations* and medical examinations, and the manner and form of adjudications and awards." (Italics ours.)

Section 405, of the same Act of October 6, 1917, 40 Stat. 398, read as follows:

> "That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. The Court, as part of its judgment, shall determine and allow such reasonable attorneys fees, not to exceed ten percentum of the amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his attorney; and it shall be unlawful for the attorney or any other person acting as claim agent or otherwise to ask for, contract for, or receive any other compensation because of such action. *No other compensation or fee shall be charged or received by any person except such as may be authorized by the commissioner in regulations to be promulgated by him.* Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding $500.00, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the Court." (Italics ours.)

Section 8 of the Act of June 12, 1917, 40 Stat. 102 read as follows:

> "That there is hereby added to such Act a new section to be known as section five a, to read as follows: —

Sec. 5a:—*No claim agent or attorney shall be entitled to receive any compensation whatever for services in the collection of claims against the Bureau of War Risk Insurance for death, personal injury, or detention, except when proceedings are taken in accordance with section five in a district court of the United States,* in which case the judge shall, as a part of his determination and order, settle and determine the amount of compensation not to exceed ten percentum of amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his legal adviser or advisers, *and it shall be unlawful for any lawyer or other person acting in that behalf to ask for contract for, or receive any larger sum than the amount so fixed.'"* (Italics ours.)

POINT I.

THE REPORTS OF THE HOUSE AND SENATE COMMITTEES ACCOMPANYING THE BILL, H. R. 11245, 65TH CONGRESS, 2ND SESSION, PRIOR TO ENACTMENT, AND THE COMMUNICATION OF THE SECRETARY OF THE TREASURY, INCORPORATED THEREIN, ESTABLISH, BEYOND DOUBT, THAT THE LIMITATION OF $3.00 "FOR SUCH ASSISTANCE AS MAY BE REQUIRED IN THE PREPARATION AND EXECUTION OF THE NECESSARY PAPERS" APPLIES ONLY TO THE CLERICAL WORK OF FILLING OUT A FORM. THE TRIAL JUDGE AND THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT THEREFORE ERRONEOUSLY CONSTRUED THE PROVISIONS OF THE ACT IN DECIDING THAT A GREATER CHARGE THAN $3.00 FOR USEFUL, ELABORATE, AND SUCCESSFUL INVESTIGATION AND PRELIMINARY PROFESSIONAL SERVICES WAS WITHIN THE CRIMINAL PROHIBITION OF THE STATUTE.

We respectfully submit that the construction placed upon the Act, under which the petitioner was convicted, by the Circuit Court of Appeals and by the District Judge in his last charge to the jury, was erroneous. A careful reference to the circumstances dealing with the amendment of the prior law, which resulted in the Act under consideration, will reveal the necessity for the amendment, the presence of the language containing the limitations of the $3.00 fee, and the intention of the law makers with respect to the activity prohibited thereunder.

Numerous cases of this Court have established that the reports of the Committees accompanying

legislation prior to its enactment, are an important, and, indeed, a controlling aid in the construction of the statute.

The intention of Congress with respect to the conduct prohibited under the enactment can also be learned by reverting to the circumstances of the enactment. We must place ourselves in the position of the Congress which enacted it, at the time of its enactment, with a complete knowledge of the prior legislation on the subject, and the specific evils sought to be remedied. What was, therefore, the old law, the specific mischief, and the proposed remedy? What were the objects, the scope, and the content of the amendment of the Act of May 20th, 1918? What did Congress have in mind at the time of the passage of the law?

The following expressions of this Court guide us in this interpretation:

Mr. Chief Justice Taft in *Stafford vs. Wallace*, 258 U. S. 495, at page 512, states as follows:

> ". . . . . but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted."

In *Duplex Co. vs. Deering*, 254 U. S. 443, at page 474, it was stated:

> "But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure."

In *Woodward vs. De Graffenried,* in 238 U. S. 284, at page 296, it was said:

> "So far as these reports antedate the legislation that is under inquiry, they may of course be resorted to as aids to interpretation, for the Commission was in a very real sense 'the eyes and ears' of Congress in matters pertaining to affairs in the Indian Territory, and legislation was framed with a special regard to its recommendations."

Sutherland, J. in *Ozawa vs. United States,* 260 U. S. 178, at 194, says:

> "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with the design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

In *Holy Trinity Church vs. United States,* 143 U. S. 457, at page 472:

> "The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

And again at page 463:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States vs. Union Pacific Railroad*, 91 U. S. 72, 79."

The Act of May 20th, 1918, was passed to meet the pressing need for legislation to curb a definite and specific practice which had at the time of the enactment of the law reached scandalous proportions. Under Section 13 and Section 405 of the Act of October 6th, 1917, which was the law prior to the passage of the Act of May 20th, 1918, there was a restriction merely as to the amount of recovery. No sum greater than 10% was to be paid

to claim agents or attorneys for services in connection with the matters dealing with allotments, compensation, or insurance. The law, as it then stood, was not deemed to contain any effective prohibition against certain definite and specific practices of unscrupulous attorneys of the nether bar. The exact evil was the solicitation of supposed beneficiaries, and the exaction of amounts equal to 10% of the recovery in cases only where affidavits or forms were filled out and presented. The mischievous zeal of these attorneys knew no bounds. They did not even hesitate to scan the soldier and sailor death lists published in the daily papers, and to solicit claims from parents and relatives who were beneficiaries under the insurance of the deceased soldier. The impression was fraudulently given by these claim agents that it was necessary for claimants to employ attorneys to prosecute their claims. The practice of exacting a sum of 10% of the recovery for the mere filling in of a form or an affidavit of claim had become so widespread, that the necessity of making criminal the charge of a large sum in cases, where there was no question of the death of the soldier, and no dispute of the right of the beneficiary to recover under the policy, was urged upon Congress. The necessity and purposes of the amendment of the law, as it then stood, appear plainly in the letter of the Secretary of the Treasury, Mr. McAdoo to Mr. Simms, Chairman of the House Committee on Interstate and Foreign Commerce, which is incorporated in the House and Senate Reports accompanying the bill, H. R. 11245, 65th Congress, Second Session. The House Report bears No. 471, 65th Congress, Second Session, and the Senate Report bears No. 429, 65th Congress, Second Session. Portions of Mr. McAdoo's communication are as follows:

"* * * proposed amendment of the War Risk Insurance Act is designed to circumvent sharks who are already seeking to prey upon the beneficiaries," and

"Unscrupulous attorneys and claim agents are circularizing prospective claimants with literature in which they seek to neutralize the warnings of the department by assertions that their employment will facilitate the prompt allowance of claims * * * *They are seeking to mulct the unwary out of hundreds of dollars for services that are either entirely unnecessary or would be amply remunerated by a nominal fee.*" (Italics ours.)

In the House Report, supra, accompanying the bill, and following the letter of the Secretary of the Treasury, there appears the following statement of the Committee in charge of its passage:

"The great necessity for legislation of this character is of course evidenced by the letter of Secretary McAdoo. Many complaints have come to Members of Congress and to the War Risk Bureau from unfortunate people who have lost relatives since the war began, in which these firms of lawyers or agencies are trying to do what is little short of fraud and graft. They find out the name of a soldier who has died or has been killed, and immediately take up with the family the question of their appearing before the bureau in order that their claim may be adjusted, and at the same time creating the impression that it is necessary for these people to employ an attorney and pay him 10% of all that is recovered. *As a fee for the preparation of papers which*

the bureau will send these people, the committee has fixed a maximum charge of $3.00, *which we believe is ample for the work that will be necessitated in filling out these papers.* (Italics ours). If the case goes to court, the amendment follows the language to some extent, as in Section 405 of Article 4 of the original act, which allows the Court to place a fee for an attorney with 10% of the amount recovered as the maximum. We believe with this amendment to Section 13, that this vicious practice of organizations of the kind named above will practically cease. As evidence of what representations these unscrupulous attorneys are making, I insert here copy of some of the letters and proposed contracts that are being mailed out by one of those firms.

Washington, March 11, 1918.

Mrs. Jos. Young:

We regret to note the recent loss of a member of your family in the service of the United States. His accounts, including arrears of pay, extra pay, travel pay, etc. remain to be settled by the Treasury Department. We will be glad to represent you in collecting all that may be due under existing law, ruling and decisions, and we enclose the proper application form, which please sign and swear to, in the presence of two witnesses, before any convenient notary public or Justice of the peace, and promptly return to us.

At the same time please date, sign and return the agreement as to fee, which you will

note is moderate and payable only in accordance with the terms of the agreement. It need not be sworn to. We will instruct you, after filing the claim, as to such proof, if any, as may be necessary to establish your right to receive the money due.

Hoping to have the pleasure of serving you,

Very truly yours,

With the amendments which we have made to Section 13, we believe that Section 405 of Article 4 becomes unnecessary, hence Section 2 of the bill providing for the repeal of Section 405 of Article 4."

While we may not resort to the individual opinions of the Members of Congress for a construction of the Statute, it is illuminating to note that the debates in Congress with respect to this measure, 65th Congress, Second Session, Volume 56, Part 5, pages 5220 to 5226, have reference only to the scandalous practices just described.

There is absolutely no suggestion or intimation to be found in any source that there was to be a prohibition against honest, bona fide, and useful investigation work. Neither in the reports of the Committees, the documents incorporated therein, nor in the debates in Congress, from which we can learn the history and circumstances of the legislation, is there anything spoken, or inferred, which would bar and make criminal, elaborate and extensive investigation work, or professional services similar to that performed by the petitioner in the case at bar.

The fact is that the legislation was aimed solely against the fraudulent and scandalous conduct of taking large sums of money for nominal services. There was no intention, or even a thought in the

mind of Congress, to prohibit activity of the kind performed by the petitioner. The necessity and usefulness of the petitioner's efforts in this case stand in honorable contrast to the outrageous activities of those against whom the laws are aimed. A remedial statute must be interpreted so as to embrace the remedies it was intended to afford; but a construction should not be announced which would accomplish a result not within the contemplation of the framers.

POINT II.

THIS CRIMINAL STATUTE MUST BE CONSTRUED STRICTLY AGAINST THE GOVERNMENT, AND LIBERALLY IN FAVOR OF THE PETITIONER.

The criminal conduct prohibited by a penal statute must be plainly and unmistakably within the clear import of the language used. The words of a penal statute which subject an individual to punishment for crime, must be construed strictly, and those portions of the Act which exempt from penal consequences, and from which there can be implied an exemption, must be construed with liberality. A criminal statute cannot be extended by implication, nor can the Court enlarge criminality so as to embrace acts not specifically, definitely, and explicitly pointed out by the plain words of the act. The law does not favor constructive penal offenses.

This elementary canon of statutory construction needs no extended citation of authority, nor quotations from the language of the adjudications

of this Court. We need merely refer to some of the very latest expressions by this Court of this principle:

Addy Co. vs. United States, 264 U. S. 239, 244, 245;
Krichman vs. United States, 256 U. S. 363, 367, 368;
United States vs. Weitzel, 246 U. S. 533, 543;
United States vs. Northern Pacific Ry. Co., 242 U. S. 190, 192;
United States vs. Bathgate, 246 U. S. 220, 225.

Bearing this rule in mind, we can proceed to a consideration of the Act of May 20th, 1918, both with respect to the language of the Act itself, and its relation to prior legislation upon the same subject matter.

The form of the statute aids us greatly in arriving at its true construction. It commences with broad general language, which grants express and implied powers to the Director, subject to the general direction of the Secretary of the Treasury, to make rules and regulations necessary or appropriate to carry out its purposes. Referring to the Act itself, which appears on page 12 of the brief, it is plain that the Act grants:

1. General powers, express and implied "necessary or appropriate to carry out the purposes" of the Act.

2. The specific power "to regulate and provide for the nature and extent of proofs and evidence."

3. The specific power with respect to "the method of taking and furnishing the same in order to establish the right to benefits of * * * insurance provided for in this Act."

4. The specific power with respect to "methods of making investigations."

The clause granting the general powers contains the words "necessary or appropriate to carry out its purposes," and brings to mind the "necessary and proper" clause of the Constitution of the United States. The classic argument with respect to the doctrine of implied powers announced by Chief Justice Marshall in *McCullough vs. Maryland*, 4 Wheaton, 316 at 418, is entirely apposite. The very inclusion of a clause, which empowers the director to announce rules and regulations "necessary and appropriate to carry out its purposes" indicates that the director is authorized to announce such, as would most advantageously effect the enforcement of the claimant's rights. There is no positive and clear prohibition against investigation work, and the Act itself in various portions invokes the necessity of skilled, able, and expert assistance.

A review of some of the Sections of the War Risk Insurance Act indicates that it contemplates the employment of skilled and able aid. The Act prescribes, in various places, that the claimant comply with the minute, detailed, and technical requirements. It cannot be construed, in view of these requirements, absolutely to deny outside aid and investigation, and as a consequence, adequate payment for such aid.

For example, under the Act of October 6th, 1917, Section 22 requires copies of public or church rec-

ords, or the affidavit of a clergyman, or two eye witnesses, or church records, to support a claim of a wife. Could the Act, at the same time that it prescribes exact compliance with the technical and troublesome standards it announces, consistently bar employment of an investigating agent or attorney to search out the public or church records in a distant State or country; to ascertain the whereabouts of a clergyman who would be competent to execute an affidavit; to trace and discover the location of the two eye witnesses; and to obtain proper copies of the church records?

Manifestly, the power granted to the Director to announce rules with respect to the "methods of making investigations", to "regulate and provide for the nature and extent of proofs and evidence", and "the method and taking and furnishing the same in order to establish the rights to benefits of insurance provided for in this act", coupled with a clause empowering additional regulations "necessary or appropriate to carry out the purpose" of the Act, are an ample source of authority for promulgating rules for compensation of investigating agents, to aid in the proper compliance with the Bureau's own rules, and effect an efficient performance of them. The employment of an attorney to assist in the proper collection and presentation of required data appears to be an appropriate, if not a necessary, incident.

The peculiar form of the statute has both a historical setting and a practical meaning. We cannot understand the Act of May 20th, 1918, and the specific limitations of the two provisos therein contained without resorting to a consideration of the prior legislation.

The general powers possessed by the Director under Section 13 of the Act of May 20th, 1918,

find their source in the Act of October 6th, 1917. The Act of May 20th, 1918, struck out from the Act of October 6th, 1917, the words "to regulate the matter of compensation, if any, but in no case to exceed ten per centum. to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles 2, 3, and 4."

The Act of May 20th, 1918, by Section 2, likewise struck out the exact language contained in Section 405 of the Law of October 6th, 1917, and which included the significant language *"no other compensation or fee shall be charged or received by any person except such as may be authorized by the Commissioner in regulations to be promulgated by him."*

Therefore, under the Act of October 6th, 1917, the Commissioner had unlimited powers to announce general rules and regulations which under the above manifest wording of Section 405 would indubitably comprehend regulations with respect to the compensation of investigating agents, finders of facts, and the kind of service performed by the petitioner in the case at bar. If we examine Section 13 of the Act of October 6th, 1917, we note that it distinctly appears that the Director "shall decide all questions arising under the Act, *except as otherwise provided in Sections 5 and* 405."

The language in the latter part of Section 13, "to regulate the matter of compensation, if any, but in no case to exceed ten per centum. to be paid to claim agents or attorneys for services in connection with any of the matters provided for in Articles 2, 3, and 4", seems to be in conflict with Section 405, and to that extent would seem to be superseded by Section 405 by the very wording adverted to above.

When we, therefore, construe the content of Section 13 of the Act of May 20th, 1918, we see that it substantially took over the powers of Section 13 of the Act of October 6th, 1917, and those of Section 405 of the Act of October 6th, 1917. Bearing in mind also the specific evil against which the legislation was aimed, as discussed in Point I of this brief, we see plainly that there was no intention to restrict the liberal general powers already possessed by the Director and Commissioner under the Act of October 6th, 1917, except as to the limitation as to $3.00 for filing the form set forth in the Act of May 20th, 1918. The exact limitation, in view of the spirit and purpose of the Act of May 20th, 1918, was, as we have seen, merely to change the law with respect to the fraudulent exaction of a large sum for nominal services, without the intention of interfering in any way with the unqualified powers which Section 13 carried over in large measure from the Act of October 6th, 1917.

> "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached." Sutherland, J. in *Cox vs. Hart*, 260 U. S. 427, at 435, cited with approval by Sanford, J. in *United States vs. Morrow*, decided January 5th, 1925.

The generic powers therefore, possessed by the Director and the Commissioner under the Act of October 6th, 1917, were continued, and not relinquished, with the exception of the case of charging more than $3.00 for the filling in of the forms or affidavits of claim.

The significant change in the wording, however, of the Act of May 20th, 1918, in contrast with the language of the Act of October 6th, 1917, is that whereas, under the Act of October 6th, 1917, the charge by the attorney must have found its source in the rules to be announced by the Director or the Commissioner, under the Act of May 20th, 1918, the burden shifted to the Government to prove that there is a prohibition in the rules against the charge. Under the Act of October 6th, 1917, it would seem that the attorney must point to a specific rule for his authority to charge a fee, whereas, under the Act of May 20th, 1918, the Government must point to a specific rule which prohibits the charge of the fee. The form of the wording of Sec. 405 is no longer retained.

Therefore, when we come to the second paragraph of the Act of May 20th, 1918, the language which states in substance that any person who charges any fee or compensation "except as herein provided" must be taken, as Judge Baker has pointed out, in *United States vs. Rodgers, supra*, to refer only to the two specific items in the Act. The cogent and forceful reasoning of Judge Baker is as follows:

> "It is contended by the Government that in only two cases are attorneys authorized to charge or receive fees in connection with their services in collecting claims against the Bureau of War Risk Insurance. They are, according to the Government's contention: (1) a charge of $3.00 for 'such assistance as may be required in the preparation and execution of the necessary papers'; and (2) where there is a disagreement between the beneficiary and the bureau and a suit is brought and judgment rendered. In the latter case it becomes the duty of the trial Judge to ascertain and fix

by an order, as a part of his judgment, a reasonable compensaton for prosecuting the suit not to exceed five per cent. The Government contends that in no other case; under no other conceivable conditions; and for no other services than those two cases is an attorney entitled to charge or receive any compensation, and that in those two cases he cannot receive a greater compensation than the amounts specified. With the latter contention, I agree, but I cannot bring myself to the conclusion that Congress intended any such result as to the cases not specifically enumerated therein. Certainly the language of the first paragraph of Section 10264 does not so indicate.

But, says the Government, the last paragraph in plain terms forbids it. The language of the last paragraph is 'Any person who shall directly or indirectly solicit, contract for, charge or receive, or who shall attempt to solicit, contract for, charge or receive any fee or compensation, *except as herein provided* shall be guilty,' etc. The Government says that by this language Congress has forbidden any charge whatever except in the two cases indicated.

If we take this paragraph literally, (assuming it to be constitutional) and give full effect to the construction contended for by the Government, Congress has forbidden any and all attorneys' charges in any and every conceivable case except the two referred to. This of course is absurd, and it will then be contended that as this paragraph is in the statute relating to War Risk Insurance, its scope is to be understood only as limiting charges for the collection of War Risk Insurance claims. The answer is that the statute itself does not so state.

*It does not say that no person shall 'directly or indirectly solicit, contract for, charge or receive * * * any fee or compensation for services in the collection of claims against the Bureau of War Risk Insurance except as herein provided'; and to give it that effect we must read into the paragraph something that is not there. This is a criminal statute; it must be strictly construed. There is no such thing as a statutory crime unless the acts constituting it are specifically stated in the statute and punishment is prescribed. I cannot find in this statute anything indicating an intention on the part of Congress to forbid charges except in the two cases above specified. The only thing forbidden by this statute is a charge for the particular services therein specified in excess of the limitations therein fixed."* (Italics ours.)

POINT III.

EFFECT MUST BE GIVEN TO EVERY PORTION OF THE STATUTE. A CONSTRUCTION WHICH RENDERS PART OF THE ACT CONTRADICTORY AND REPUGNANT TO ANOTHER MUST BE AVOIDED. THE COURT IS UNDER A DUTY TO CONSTRUE THE STATUTE SO AS TO RENDER IT HARMONIOUS AND CONSISTENT IN ITS ENTIRETY.

Unless we adopt Judge Baker's reasoning, the wording in the second paragraph would not fit in with the general scheme of the statute; but we would be taking away powers under the second paragraph which were plainly granted in the first paragraph of the section, in the portion dealing with the announcement of general rules and regu-

lations by the Director subject to two specific, *definite, and explicit limitations. The Act must* be read in its entirety.

The canon of strict construction of a criminal statute cannot be violated, especially so as to make one portion of an Act inconsistent with another. Effect must be given to every word, clause, paragraph, and portion of the entire statute. The Court is under a duty to reconcile different portions of a statute and construe them so that the whole act is consistent and harmonious. Each part of the statute must have an intelligent meaning, and content must be ascribed to each individual part. The second paragraph cannot take away what the first paragraph has evidently granted. There must not be any contradiction unless the language is too plain to admit of doubt.

We bring to the Court's attention, the words of Chief Justice White in *Van Dyke vs. Cordover Copper Co.*, 234 U. S. 188, at page 191:

> "But we may not in order to give effect to those words virtually destroy the meaning of the entire context, that is, give them a significance which would be clearly repugnant to the statute looked at as a whole and destructive of its obvious intent."

And also the language of the Court in *New Lamp Chimney Co. vs. Ansonia Brass Co.*, at 91 U. S. 656, at 663:

> "Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation,—as by qualifying both, or by restricting one

> and giving to the other a liberal construction, —all become harmonious, and the whole difficulty disappears; and in such a case the rule is, that repugnancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker."

And again the statement of McKenna, J., in *A. Bryant Co. vs. N. Y. Steam Fitting Co.,* 235 U. S. 327, at page 337:

> "The Act of Congress is undoubtedly ambiguous. Indeed, considering the letter only of the three provisos with which we are concerned they absolutely repel accommodation. We must try, however, to give coherence to them and accomplish the intention of Congress."

(A) The words "Except as herein provided" forbid merely "a charge for the particular services therein specified in excess of the limitations therein fixed," Baker, J., in *U. S. vs. Rodgers*, page 77, *supra*, and must, therefore, in view of the broad, comprehensive, and general powers granted to the Director, prior to the two provisos necessarily be limited to the two cases of filling in the form and suit. A proviso is merely a limitation on general power.

The limitation of compensation in the case of filling in of an affidavit of claim and in case of law suit are the only two cases "herein provided."

Elaborate investigation work and the discovery of *facts upon which the claim* is based are not provided for in the statute, and are not within the criminal prohibition of the Act. They are a subject matter upon which the Director of War Risk Insurance, in the absence of a prohibition upon his general powers, could properly announce rules and regulations. Since there is a limitation only on the Director's power with respect to the two specific items of filling in the form and the suit, there is no violation of the law by the petitioner in charging more than $3.00 for the comprehensive and useful professional services which he rendered to his client.

This construction leaves enough teeth in the Statute to prohibit the kind of activity it intended to proscribe. Its effectiveness against illicit solicitation and fraudulent imposition is retained without diminution. The full benefits of the law are present in the two instances cited, and especially in the specific amendment of prohibiting a charge of more than $3.00 for mere nominal service, against which the Act of May 20, 1918, was especially aimed.

(B.) THE PHRASE "THAT NO CLAIM AGENT OR ATTORNEY SHALL BE RECOGNIZED IN THE PRESENTATION OR ADJUDICATION OF CLAIMS", IS MERELY A LIMITATION UPON THE POWER OF AN ATTORNEY OR CLAIM AGENT TO REPRESENT THE BENEFICIARY AND IS RESTRICTED TO "PRESENTATION" AND "ADJUDICATION." IT DOES NOT RENDER INVESTIGATION WORK CRIMINAL.

The language of the statute "that no claim agent or attorney shall be recognized in the presentation or adjudication of claims" under Articles 2, 3 and 4, except in case of suit to recover the proceeds

of a contract of insurance, a percentage of the recovery, where a judgment has been entered, is allowed, does not make a charge for elaborate and useful investigation work a criminal offense. The word "presentation" evidently, as the context of the Act shows, refers to the physical filing of the affidavit of claim or sending the same enclosed in the attorney's letter.

The bare wording of the statute is "that no claim agent or attorney shall be recognized in the presentation or adjudication of claims" except that under a contract of insurance there may be a percentage compensation for the suit where judgment has been entered. It is apparent that the sole prohibition against recognition of an attorney or claim agent applies only to "presentation" and "adjudication," and that there is no comprehensive, or all-inclusive bar against any other kind of work. The term "presentation" when examined in connection with the physical context, obviously refers to the "presentation" of the form of claim, and the "adjudication" seems to refer to a trial of law. If adjudication refers to compromise or settlement and anything short of a judgment obtained only after trial in a District Court of the United States, it raises a grave constitutional question, discussed in Point X of the brief. Those are the only two items of service within the provisos limiting the general powers. Therefore, such services as elaborate preparatory and investigation work, are not within the prohibition of the law.

It is plain that the mere words "shall not be recognized" have an absolutely different meaning than the unmistakable words "shall be criminal."

We do not have to go to the extent of invoking the rule of strict construction of a criminal statute. All that "shall not be recognized" can pos-

sibly mean is a lack of power on the part of the representative to speak or act in behalf of the client. For example, before a representative can appear in an income tax matter, he must be enrolled as a member of the bar of the Treasury Department to be able to practice before that body. If a representative appears without a power of attorney, and without a card showing proper enrollment, the Treasury Department officials will refuse to deal with him. If the argument has already commenced, and it develops that the representative is not properly authorized or enrolled, the officials will refuse to hear him further and strike his remarks from the record. The attorney or agent of the client, in such a case, has no standing, and the officials will not recognize his authority to act unless he complies with the statutes or rules. Can we, therefore, fairly, say that the mere lack of power to represent a client is tantamount to subjecting one's self to the criminal penalties of the law?

The Circuit Court of Appeals at S. P. 99, states, in substance, that in negotiation with the Bureau, the petitioner must have been recognized as an attorney in the presentation of her claim, and if he was so recognized that it was in the face of the statute, and that he could recover nothing for services which he was forbidden to render. The plain answer is that there was no criminal forbidding of such activity by the terms of the statute, and furthermore, that in his dealings with the Bureau he did not "present" or "adjudicate" the claim but was merely "investigating" it. Under a strict construction of this criminal statute, to which the petitioner is entitled, the word "presentation" cannot be taken to mean more than the physical transmission or delivery of the affidavit

of claim to the Bureau, subsequent to its execution. It might be taken there by the attorney in person, by his clerk, or sent in with a letter from the attorney enclosing the form to the Bureau at Washington. We cannot extend by implication the word "presentation" past its natural meaning.

Let us suppose in this connection that the Burns Investigating Agency (and a fortiori, the petitioner in so far as he was an investigator) entered into an agreement with the beneficiary to make a per diem charge for such investigation work. Let us suppose, further, that the investigator could not find anything in Washington or even in the battle area in France to substantiate the claim that the insured had died. Or let us suppose that a thorough, exhaustive investigation revealed that the insured was really alive. Would a charge for such work be a criminal violation of the wording under consideration? It clearly would not, because there was no dealing with anybody in the Bureau; there was no "presentation" because there was no physical delivery of any affidavit of claim; and there was no "adjudication" because there was no action in a Court of Law.

We respectfully submit that the Circuit Court of Appeals would be compelled to answer that such a per diem charge, for the work just detailed, would be a violation of that particular wording of the statute.

POINT IV.

A CRIMINAL STATUTE MUST RECEIVE A REASONABLE, RATIONAL, AND SENSIBLE CONSTRUCTION IN PREFERENCE TO ONE THAT IS ABSURD, ARBITRARY, AND UNREASONABLE. THE TERMS OF THE ACT MUST BE CONSTRUED WITH RELATION TO ITS OBJECT AND THE EVILS IT WAS DESIGNED TO REMEDY. THE LETTER OF THE LAW MUST YIELD TO THE POLICY AND SPIRIT IN ORDER TO AVOID ABSURD CONSEQUENCES.

A reasonable and natural meaning, rather than a strained or improbable one, must be ascribed to a statute. Any construction which leads to an absurdity must be rejected. Even the plain letter of the statute can be disregarded, where its application will work a manifest injustice. The construction contended for by the Government alarms the Bar of this Country, afflicts veterans' claims with a loathsome disease, and places a low estimate, indeed, upon honest, elaborate, and useful services rendered by a member of a learned profession.

We respectfully submit that under the canon of strict construction, outlined in the preceding point, there was no violation of the law by the petitioner. We respectfully submit that under the benefits of the canon, the petitioner must be adjudged not to have violated the Act under consideration. The petitioner, moreover, must receive the benefits of various other canons of construction. Even if the plain language of an Act obviously prohibits certain conduct, the courts have announced that one may break the letter of the law, but not necessarily violate the spirit. The acts to be punishable must come not only within the literal words of the

statute, but also within its reason and spirit and the mischief it was intended to remedy.

In *Baender vs. Barnett,* 255 U. S. 224, at page 225, Van Devanter, J., says:

> "While its words are general, they are to be taken in a reasonable sense and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts. A citation of three will illustrate our view. In *Margate Pier Co. vs. Hannam,* 3 B. & Ald. 266, 270, Abbott, C. J., quoting from Lord Coke, said: 'Acts of Parliament . . . . . are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.' In *United States vs. Kirby,* 7 Wall. 482, 486, this Court said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense excepts the ruling, cited by Plowden, that the statute of 1st Edward 11, which enacts that a prisoner who breaks prison should be

guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt.'"

In *Union Pacific R. R. Co. vs. Snow,* 231 U. S. 204, at page 213, this Court says:

> "But these considerations are simply the result of dwelling upon the literal terms of the Act. But this is obnoxious to the rule of the cases. Courts will not, as we have seen, enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out and their sufficiency to prevail over a literal interpretation of a statute."

In *Heydenfeldt vs. Daney Gold, etc., Co.,* 93 U. S. 634, at page 638, this Court says:

> "It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Judge Sharswood, 'to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction. Gyger's Estate, 65 Penn St. 312. If a literal

interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the Act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration."

And the famous utterances contained in *Holy Trinity Church vs. United States*, 143 U. S. 457, at page 458:

> "*It must be conceded that the act of the corporation is within the letter of this section,* for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. *While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within*

> *the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.* This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, *for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.*" (Italics ours.)

and at page 460:

> "We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. *The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be observed the act must be so construed as to avoid the absurdity. The court must restrain the words.* The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." (Italics ours.)

have been cited and approved by this Court in numerous cases.

See also:

Knowlton vs. Moore, 178 U. S. 41, 77;
Lau Ow Bew vs. United States, 144 U. S. 47, 59;

United States vs. The Garonne, 11 Pet. 73, 77.

In view of the history and circumstances of the enactment of the legislation, which we have outlined in Point I, *supra*, and in view of the only activity intended to be prohibited, and the general powers and authority of the Director and the Commissioner under the Act of October 6th, 1917, carried over by the Act of May 20th, 1918, to announce rules and regulations, which are an adequate source of power to announce rules with respect to the services performed by the petitioner in this case, can we not, therefore, apply the rule that, even if the language is not vague and ambiguous (which we respectfully submit it is) and appears to embrace the activity performed by the petitioner, that such a result was deemed not to have been intended unless the legislative intention, as well as the literal words employed, establish a manifest, clear and unmistakable inclusion?

Let us suppose that at the time of the receipt of this letter by Mr. Margolin he had stated to Mrs. Cohen, that in view of the absolute lack of knowledge on the part of the War Department, it was necessary for Mrs. Cohen to retain the William J. Burns Agency or some investigation bureau to dispatch a man to Washington or the battlefields of France, in order to complete a report as to whether Private Freeman had actually been killed in battle, and that Mr. Margolin had stated, at that time to Mrs. Cohen, that he was restricted to $3.00 for his work; but that he could not proceed unless he had the report establishing the existence of Private Freeman's death.

Can the statute be so extended by implication as to make criminal the receipt by the Burns Agency

or the investigation bureau for the work in discovering the facts concerning Private Freeman's death? Can the section reasonably be construed so as to extend its prohibition to investigation work and the discovery of facts in this situation? Was not, however, the position in which the petitioner found himself the same as an investigation bureau, especially when it was conceded by the Government upon the trial that the complaining witness did not know positively, at the time she engaged the petitioner, whether the insured had died (S. P. 42); and that the petitioner went to Washington at the complaining witness's request? (S. P. 66).

Of course, if we agree that the wording of the statute cannot be construed so as to include the investigation bureau or a fact finding agency, it follows absolutely that the petitioner may assume a dual role, that of an investigator or a finder of the facts and also claim agent or attorney. This is exactly what seems to have been in the mind of the jury when they came back and asked for further instructions by the Court. We quote from S. P. 89 of the record, which reads as follows:

> "The Court: Gentlemen of the Jury, I have this communication from your foreman: 'Are we to understand the work performed by the defendant prior to filling in of affidavit, as part of the work covered by law in making out application, or a separate charge? (signed) John H. Bruning, Foreman.'
>
> "I charge you that the defendant could lawfully make no charge for any work he did in excess of three dollars. The indictment alleges in the first count that he charged and received $1,500 for services performed in the preparation and presentation of the affidavit

to the Veterans' Bureau, and in the second count that he solicited $500 for services in such preparation and presentation. To find him guilty on either count he must be found to have charged or solicited more than three dollars for the preparation and presentation of the affidavit, because the charge which he is required to meet under the terms of the indictment as drawn, is soliciting more than the lawful amount for the preparation and presentation of the affidavit. Is that clear to you now? The Foreman: 'Yes.'"

The jury very clearly had in mind whether they could distribute the amount charged, into investigation work and work for filling in the form. If we substitute the petitioner for the investigation bureau, is not the charge of the court to the jury reversible error, in that it absolutely disregards work which he might have done in place and stead of an investigation agency, which would be specially retained to send a representative to Washington, or to France, to determine the facts as to the death of Joseph Freeman?

Let us suppose another actual case, concerning which an attorney requested an opinion from counsel in this case.

A soldier died leaving an insurance policy of $10,000.00 to a beneficiary, who also died. In order to present the affidavit of claim by the next of kin, it was necessary to apply for letters of administration in the Surrogate's Court in New York County, so that the next of kin of the deceased beneficiary would be able to establish the source of his right to succeed to the beneficiary's claim to the $10,000.00. It developed, however, that the letters of administration were sought by conflict-

ing interests, and letters were granted to the successful party only after a contested proceeding before the Surrogate. The only asset of the estate of the beneficiary was the right to the $10,000.00, and the only purpose of the proceedings before the Surrogate was to obtain letters of administration to collect that sum.

The attorney was uncertain, whether, in view of the fact that the language of the Act reads "that payment to any attorney or agent for such assistance as may be required in the preparation and execution of the *necessary papers*," that it included the letters of administration, which it was absolutely necessary to present to the Bureau in order to collect the money. He also wished to know whether he would engage in crime, if he should charge more than the statutory sum because of the language concerning charging for services "except as herein provided."

Since such work in the Surrogate's Court was not expressly enumerated with the Statute, under the construction of the Statute proposed by the Government, it would appear that the attorney would be violating the law if he accepted more than $3.00.

We do not think that the result of holding the attorney guilty of any criminal conduct in the case just advanced would be more sweeping in its result than that in the petitioner's case. We think that the petitioner certainly performed as much service in this case as the other attorney did in the Surrogate's Court.

Curiously enough, the same situation arose and was decided in the case of *United States vs. McKinney & Settle*, by Judge Henry C. McDowell, District Judge for the Western District of Virginia, where the Court directed a verdict of ac-

quittal for an attorney under this statute. We beg leave to incorporate a letter from Judge McDowell with reference to this point:

Henry C. McDowell,
District Judge.

UNITED STATES DISTRICT COURT
Western District of Virginia
Lynchburg, Va., April 9th, 1925.

Messrs. Kirsh, Edelman & Brandeis,
Woolworth Building,
New York City.

Gentlemen:

Yours of the 8th instant. My recollection of the *McKinney* case is that the services for which the charge was made were rendered in litigation in a state court between the heirs at law and the deceased (insured) soldier, and a claimant under what purported to be a will made by the soldier. It is true that the bone of contention was the insurance money; but the services rendered were so different from those contemplated by the federal statute, that I thought the statute did not apply.

I regret that my imperfect recollection of the facts prevents me from writing more satisfactorily.

Yours very truly,
Henry C. McDowell.

Again we must quote the sound and sensible view expressed by Judge Baker, in *U. S. vs. Rodgers* (Point XII, *supra*):

"But I do not think it necessary to base my conclusion in this case solely on technical rules of construction, even though such technical rules make irresistible the conclusion I have reached. *I cannot conceive that Congress; doubtless anticipating the thousands and thousands of cases that would arise under this War Risk Insurance Act; foreseeing that infinite complications would be inevitable; realizing the utter helplessness in many cases of the beneficiaries and the imperative need that they would or might have for persons trained as lawyers are trained, and skilled as lawyers are skilled; that the Congress of the United States would not only so hamper beneficiaries but would for all practical purposes deny to them the services of attorneys by making it unlawful for them to agree to pay their attorneys a greater compensation than $3.00 no matter how great their labor; no matter how difficult the services rendered; no matter how many personal visits to the bureau were necessary; no matter how successful their efforts.* If it be contended that this statute was enacted to protect beneficiaries from excessive charges by unscrupulous attorneys, a moment's reflection will convince that the evils that would result from such a construction are infinitely greater than the evils that that same construction would inhibit" (Italics ours).

POINT V.

THE ENORMOUSLY DISPROPORTIONATE PENALTY PRESCRIBED BY THE STATUTE, IN CONTRAST TO THE ACTS FOR WHICH THE PETITIONER WAS CONVICTED, IS ANOTHER CLEAR INDICATION THAT THE STATUTE WAS DESIGNED TO PROHIBIT SOLELY THE FRAUDULENT, OUTRAGEOUS, AND SCANDALOUS PRACTICES OUTLINED IN POINT I.

The criminal penalty prescribed entails not only a fine of not more than $500.00, but also imprisonment at hard labor for not more than two years, or by both such fine and imprisonment, for each and every offense. Not only is there this severe criminal penalty under the Act itself, but there is, in addition, as we have seen in this very case, an additional burdensome and onerous penalty, which presents itself in the case of an attorney at law, and does not affect any other individual. We refer to the disciplinary proceedings already instituted by the Grievance Committee of the Association of the Bar of the City of New York, as counsel for the petitioner have been informed, and which are being held in abeyance, pending the decision in this case.

In view of the fact that the violation of law by the petitioner would be only a technical violation, at most, contrary to the letter of the statute, should we not rather prefer a less rigorous construction, and because of the severe penalties and enormous burdens entailed, follow the wisdom expressed by Mr. Justice Clark in *U. S. vs. Northern Pacific Railway Company*, 242 U. S. 190, at 195:

"The fact that the Government sues for only one fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it, should make us slow to attribute to Congress a purpose to exact what is thus admitted to be a punishment greatly disproportionate to the offense."

POINT VI.

THE CONTRAST IN THE WORDING OF THE PROHIBITIONS WITH RESPECT TO EMPLOYMENT AND COMPENSATION OF ATTORNEYS CONTAINED IN PRIOR STATUTES, AND THE ACT OF MAY 20, 1918, UNDER WHICH THE PETITIONER WAS CONVICTED, CLEARLY INDICATES THAT THERE WAS NO CRIMINAL PROHIBITION AGAINST THE PETITIONER'S CHARGE FOR PRELIMINARY INVESTIGATION WORK.

The contrast between the sections is clearly established by a reference to the prior statutes dealing with the compensation of attorneys. Different restrictions upon the employment and fees of attorneys are contained in the Act of May 20, 1918, and prior statutes. Under the Act of June 12, 1917 (which applied to compensation and not to a contract of insurance) the exact language is "no claim agent or attorney shall be entitled to receive *any compensation whatsoever for services in the collection of claims*" except compensation in case of suit, set forth in the same section.

Under this section, *no compensation whatever was permitted for services in the collection of claims except in case of suit*, set forth in the same section. Under the Act of October 6th, 1917

(where, for the first time, contracts of insurance, as contrasted with gratuities or claims in the nature of a pension, appear), the provisions relating to the compensation of attorneys, was made less stringent. There appears, for the first time, authority to announce rules and regulations which we examined in point II, both under sections 13 and under 405, where the language contains the words "*except such as may be authorized by the Commissioner in regulations to be promulgated by him.*"

Section 405 was expressly abolished by Section 2 of the Act of May 20, 1918, the Act under which this prosecution was brought. *It is illuminating, therefore, that in the prior Acts, when Congress intended to limit compensation in a comprehensive and sweeping way, it did so in unmistakable terms.* May we not, therefore, safely draw the inference that where Congress has chosen, with a full knowledge of the sweeping and all-embracing language of the prior enactments, to employ language which stands in contrast with the clear prohibitions of the prior Acts, that there is a definite change of legislative policy? When Congress did intend such a result, as it did to some extent under the Act of October 6, 1917, and more absolutely under the Act of June 12, 1917, it did so in terms which admitted of no mistake, and the fact that with knowledge of prior enactments, Congress did not use such emphatic and explicit language, is of the greatest weight in determining that they did not so intend.

Again Judge Baker's argument in *U. S. vs. D. H. Rodgers* (see Point XII) is convincing and unanswerable:

> "It is enlightening to contrast the language of Section 10264 with the language of

10257. In the latter statute the language is clear. It says 'no claim agent or attorney shall be entitled to receive *any compensation whatever for services in the collection of claims* against the Bureau of War Risk Insurance' etc. If Congress had intended a similar inhibition in 10264 it is certain that it would have used the same similar, or other apt language. It is noteworthy that 10257 was on the statute book when 10264 in its present form was added. The statute limiting charges of attorneys for services in connection with the collection of pensions (8498 of Barnes Code) contains language very similar to that contained in 10257. The language of Section 8489 is 'no agent, attorney, or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act, shall directly or indirectly contract for, demand, receive, or retain for such services in preparing, presenting or prosecuting such claim a sum greater than $10.00' etc. In *United States vs. Frisbie*, 157 U. S., this statute is construed and applied. One has only to read 8489 and 10257 and contrast them with 10264 to conclude that the intention of Congress in the former sections was altogether different from the intention of Congress in 10264." (Italics ours.)

Are we not then driven to the conclusion that the Act of June 12th, 1917, was liberalized by the Act of October 6th, 1917, and the Act of October 6th, 1917, was in turn liberalized by the Act of May 20th, 1918. For, under the Act of May 20th, 1918, while the Director of War Risk Insurance was authorized under the first portion of that

Act to announce rules and regulations in cases which include, for example, compensation to attorneys for bona fide investigation of the facts of the claim, there was no criminal prohibition under the Act of May 20th, 1918, unless it was so made by the rules announced by the Director.

Section 405 of the Act of October 6th, 1917, that charges are unlawful *unless authorized by the Commissioner*, was expressly repealed by Section 2 of the Act of May 20th, 1918, and the only criminal prohibitions under the Act of May 20th, 1918, were, first, the two specific limitations expressly referred to as being contained "therein," and such other prohibitions as the Directors of War Risk Insurance announced, and since there was no rule prohibiting a charge for investigation work, there was no violation of law by the petitioner.

It is furthermore significant that the trial Judge permitted a sum to be charged for traveling expenses and disbursements in addition to the $3.00 prescribed by the statute (S. P. 87). No such traveling expenses and disbursements were "herein provided" within the statute, but the Judge found little difficulty in giving the statute, in this particular, a reasonable construction. Even the words "fee" and "compensation" can be given a construction, and can be taken to mean a fee or compensation which includes actual expenses and disbursements. In the case under consideration the petitioner would have entailed quite a substantial loss if he were restricted to $3.00 irrespective of expenses and disbursements. Of course, if we are compelled to construe the language without reasonable limits, such a result might necessarily follow.

POINT VII.

THE INCONSISTENT CHARGES OF THE TRIAL JUDGE TO THE JURY, AND THE INCONSISTENT VERDICT OF THE JURY, CLEARLY PORTRAY THE CONFUSING TERMS IN WHICH THE STATUTE IS COUCHED, AND THE PRACTICAL DIFFICULTIES IN ADMINISTERING IT.

The inconsistency of the trial Judge in his charge to the jury, and the inconsistent verdict of the jury indicate, in the most practical way, the difficulties in the administration of a law, whose meaning is not apparent, and whose words are susceptible of varying interpretations. We may well invoke the wise admonitions of this Court in *U. S. vs. Reese, et al.*, 92 U. S. 214, at page 220:

> "Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again, at page 219:

> "Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution. * * *"

And also the similar expression in the case of *U. S. vs. Brewer,* 139 U. S. 278, at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

The difficulty in ascertaining the true meaning of this statute is best evidenced by the difficulties in its administration. In this very case, the trial Judge was uncertain as to what acts were prohibited. The Judge first charged that no greater sum than $3.00 could be charged in any case. Then he instructed the jury that they should find the defendant not guilty, if they found that he made no charge for the preparation and presentation of an affidavit. He then again charged that he could not make a greater charge than $3.00 for any work he did. For example at S. P. 87, he says:

> "Therefore, to charge in this case more than three dollars was forbidden for the work which the attorney did, outside of his traveling expenses and disbursements, in the face of the statute."

And again at S. P. 88:

> "Mr. Serri: I would like to have your Honor charge, there is no evidence if they do not believe that he made any charge for the preparation and presentation of the affidavit and that they are to return a verdict for the defendant.
> The Court: Granted."

And again at S. P. 89:

> "The Court: Gentlemen of the Jury, I have this communication from your foreman: 'Are we to understand the work performed by the defendant prior to filling in of affidavit, as part

of the work covered by law in making out application, or a separate charge? (Signed) John H. Bruning, Foreman.'

"I charge you that the defendant could lawfully make no charge for any work he did in excess of three dollars. The indictment alleges in the first count that he charged and received $1.500 for services performed in the preparation and presentation of the affidavit to the Veterans' Bureau, and in the second count that he solicited $500 for services in such preparation and presentation. To find him guilty on either count he must be found to have charged or solicited more than three dollars for the preparation and presentation of the affidavit, because the charge which he is required to meet under the terms of the indictment as drawn, is soliciting more than the lawful amount for the preparation and presentation of the affidavit. Is that clear to you now? The Foreman: 'Yes.'"

We submit these rulings cannot be reconciled, and are inconsistent and contradictory.

And the jury's verdict conclusively establishes that it was under a misapprehension as to the meaning of the law as charged by the Court. It found a verdict of guilty on the first count of the indictment, and returned a verdict of not guilty on the second. The inconsistency of such findings is apparent. If the defendant was guilty of accepting a larger sum than $3.00 for the preparation and filing of the papers, he was necessarily guilty also of asking for a greater sum than $3.00, which petitioner admitted. The finding of the jury of guilty on the first count and not guilty on the second count further illustrates the confusion which resulted in the minds of the jury from the varying charges of the trial Judge.

POINT VIII.

THERE IS A TOTAL FAILURE OF PROOF TO SUPPORT THE SPECIFIC CHARGES OF THIS PARTICULAR INDICTMENT.

The petitioner was indicted for "the preparation and presentation" of a War Risk Insurance affidavit of claim. There is no proof that the petitioner "prepared" an affidavit within the meaning of the Statute. He did not take the acknowledgment (S. P. 70), and he did not charge anything for filling in the form of the affidavit (S. P. 70). There is, therefore, a total failure of proof with respect to the "preparation" of the affidavit. The record is absolutely barren of any testimony to the effect that the petitioner "presented" the forms to the Veterans' Bureau in Washington, D. C. It was not physically delivered by him in person, by a clerk, or even enclosed within his stationery. The fact is, that it was actually "presented" by the beneficiary herself.

We respectfully submit, that, therefore there is no proof to support the indictment in this case.

POINT IX.

IF A STATUTE IS REASONABLY SUSCEPTIBLE OF TWO INTERPRETATIONS, ONE PRESENTING GRAVE AND DOUBTFUL CONSTITUTIONAL QUESTIONS, AND THE OTHER AVOIDING SUCH QUESTIONS, THE COURT IS UNDER A DUTY TO ADOPT THE LATTER CONSTRUCTION.

This canon of construction has been cogently stated in *United States vs. Delaware & Hudson Co.*, 213 U. S. 366, at page 407, as follows:

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co. vs. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman vs. Interstate Commerce Comm.*, 211 U. S. 407."

The same ruling has been followed in the following cases:

United States vs. Jin Fuey Moy, 241 U. S., 394, 401;
Addy Co. vs. United States, 264 U. S. 239, at 245;
Bratton vs. Chandler, 260 U. S., 110, 114;
Texas vs. Eastern Texas Railroad Co., 258 U. S., 204, 217;
Baender vs. Barnett, 255 U. S. 224, 226.

POINT X.

IF THE ACT OF MAY 20th, 1918, BE CONSTRUED SO AS TO RENDER CRIMINAL THE RECEIPT BY AN ATTORNEY OF A SUM IN EXCESS OF $3.00, FOR ELABORATE AND USEFUL INVESTIGATION WORK, AND TO NULLIFY AND MAKE ILLEGAL AN AGREEMENT BETWEEN A CLIENT AND THE ATTORNEY FOR FAIR AND JUST COMPENSATION IN THE INVESTIGATION OF A CONTRACT CLAIM AGAINST THE GOVERNMENT, IT IS OPPRESSIVE, ARBITRARY, AND UNREASONABLE LEGISLATION, AND IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. CONGRESS HAS NO CONSTITUTIONAL POWER TO ATTACH ONEROUS AND BURDENSOME CONDITIONS, AND TO DESTROY CONTRACTS RELATING TO THE ENFORCEMENT OF A REMEDY, ARISING FROM PRIVATE CONTRACT BASED UPON A CONSIDERATION, AND NOT A PENSION, BOUNTY OR OTHER GRATUITY OF THE GOVERNMENT. BY MAKING VOID, ILLEGAL, AND CRIMINAL THE RECEIPT OF ANY ADEQUATE OR APPROPRIATE FEE BY AN ATTORNEY FOR THE DISCOVERY OF FACTS, THE INVESTIGATION OF A CLAIM, AND ANY PROFESSIONAL SERVICES, FALLING SHORT OF AN ACTUAL JUDGMENT, IN CONNECTION WITH A CONTRACT OF INSURANCE, CONGRESS IS, BY LEGISLATIVE FIAT, IMPAIRING THE REMEDY IT HAS GRANTED TO THE CLIENT, AND DEPRIVES THE ATTORNEY, WHO HAS ENTERED INTO A CONTRACT WITH THE CLIENT FOR THE EFFECTIVE ENFORCEMENT OF THE REMEDY, OF HIS LIBERTY AND PROPERTY IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The Act of October 6th, 1917, and the amendment of May 20th, 1918, contemplated three forms of payments to enlisted men and their dependents or beneficiaries. Payment under a *contract of insurance* appeared for the first time in the Act of October 6th, 1917, in Article 4. This was a distinct departure for payments to soldiers, and created a precedent in Congressional Legislation, that payments to soldiers were to be based upon a *contract based upon consideration* and not solely a gratuity from the Government in the form or nature of a pension. *The contract of insurance was entirely optional with the enlisted man, and was to be paid for by stated installments or premiums.* The important consideration, and what distinguished it from a pension, was the fact that it was paid for by the soldier in a manner similar to the payment of premiums on any other contract of insurance entered into with a private insurance corporation. While the rate of the premium was smaller than the rate of premium offered by any private company, and was offered with more favorable inducements, it was none the less based upon a money consideration paid by the insured, and was none the less a contract of insurance. It is even so denominated in the Act itself.

Under the Act of June 12th, 1917, there was no provision for a *contract of insurance.* The three classes of payments to soldiers and their dependents and beneficiaries provided for under the Act of October 6th, 1917, as amended by the Act of May 20th, 1918, includes *contracts of insurance* appearing in Article 4, Sections 400, *et seq.*, allotments and family allowances under Article 2, Section 200 *et seq.*; and compensation for death or disability under Article 3, Section 300 *et seq. Compensation and allowance are manifestly in the nature of a pension or gra-*

tuity in behalf of the Government. Compensation is a voluntary payment made by the Government, irrespective of contract of insurance, to the enlisted man for injuries and death; an allowance is a gratuitous amount permitted by the Government to dependents of the enlisted man.

If the Act of May 20th, 1918, is construed so as to render criminal receipt by an attorney of a sum in excess of $3.00 for any professional services, irrespective of quantity, quality and utility, and an agreement between the client and the attorney, regarding payment for such services, is nullified and rendered illegal and criminal, the legislation is oppressive, arbitrary, and destructive of the liberty and property rights of the attorney, in violation of his constitutional rights under the Fifth Amendment of the Constitution of the United States. It deprives counsel of his right to be paid adequately and in just proportion to the labors expended in behalf of his client, and the right to enforce against the client the solemn and explicit contract made between them to enforce the client's remedy in a private and personal matter. It is an arbitrary and capricious interference with an attorney's right to contract with his client with respect to his services, and makes the collection of an honest claim a criminal offense punishable by fine and imprisonment. An attorney's right to charge for professional services is his only stock in trade, and to render criminal, by legislative fiat, his receipt, or attempt to collect, what is justly and rightfully due, under a solemn, definite and explicit obligation of a client, is a deprivation of his property and an interference with his liberty, without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

Congress has no constitutional power to attach onerous, burdensome, and prohibitive conditions to the enforcement of a remedy arising *from a private contract based upon consideration*, between an insured and the Government, *in a proprietary or business function.* A contract of insurance is not a pension, bounty, or other gratuity or donation of the Government. By creating a barrier against adequate compensation by the attorney for useful and elaborate services, and invalidating and making illegal and criminal contracts entered into between client and the attorney, for extensive investigation work and preparatory service in discovering the facts of a claim under a contract of insurance, the beneficiary becomes deprived of the effectiveness of the remedy granted by Congress, by allowing the Government to be sued under the very terms of the Act, and by the appropriation of a fund available for distribution for such claims, (Section 20, Act of October 6th, 1917). Without payment of a fee to an attorney, the client cannot expect professional efforts to be expended in his behalf.

The Court will take notice that under the language of this Statute, as construed by the Government, an attorney is entitled to compensation only in a case where there is a disagreement as to the claim under the contract of insurance, and in an action on the claim brought in the United States District Court "*whenever judgment shall be rendered in an action brought pursuant to this provision*, the Court, as part of its judgment, shall determine and allow such reasonable attorney's fee" in the amount and the manner therein specified. The construction sought to be placed upon this Act by the Government would render criminal even the payment to an attorney of a fee in excess of $3.00 for any professional services falling short

of an actual judgment in the United States District Court. The Government would prohibit a charge in excess of $3.00 for the compromise and settlement of an insurance claim with the Bureau, without resort to court proceedings, and also in the collection of the proceeds of an insurance policy pursuant to a stipulation entered into, after the trial had commenced and prior to the actual entry of judgment in the action.

It is no answer to say that the United States can be sued only with its own consent and that, therefore, can be sued only under such conditions as it sees fit. The contract of insurance in this case was entered into between Private Freeman and the United States after the enactment of the law, and after Congress had authorized suit to be brought against the United States, and appropriated a fund for the payment of insurance claims. The contract of insurance was entered into with reliance upon the right to recover in a proper case, and the right of a complete and effective enforcement, which includes, necessarily, employment of able and learned counsel, thorough investigation of facts, and adequate payment in return for such professional services.

The effect of this legislation is to withdraw as a source of professional services, an extensive and lucrative field of practice, from which an attorney's professional work is derived. If this Act be held constitutional, the operations may be extended into every field in which the United States engages in a proprietary and business function. A capricious embargo by Congress against markets of a merchant is no more a deprivation of property than prohibiting an attorney from handling a class of cases which, but for the ipse dixit of Congress, would yield a profitable source of income.

We respectfully urge upon the Court the forceful language of Mr. Justice McReynolds, delivering

the dissenting opinion in *Calhoun vs. Massie*, 253 U. S. 170, at page 181, in which McKenna, Van Devanter, and Pitney, JJ., concurred:

> "It is certainly a very serious thing to decide that Congress, by its arbitrary fiat, may wholly deprive counsel of the right to enforce payment of compensation for long continued efforts theretofore lawfully put forth, and prevent him, indeed, from accepting anything therefor. If a limit may be set at twenty per cent. any payment may be proscribed."

And again at page 182:

> "The Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power. It declares, no person shall be deprived of life, liberty or property, without due process of law; and this inhibition protects every man in his right to engage in honest and useful work for compensation. *Adair vs. United States*, 208 U. S. 161; *Coppage vs. Kansas*, 236 U. S. 1; *Adams vs. Tanner*, 244 U. S. 590."

And the statement of the law by Sutherland, J., in *Adkins vs. Children's Hospital*, 261 U. S. 525, at 545:

> "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question. *Allgeyer vs. Louisiana*, 165 U. S. 578, 591; *New York Life Insurance Co. vs. Dodge*, 246 U. S. 357, 373, 374; *Coppage vs. Kansas*, 236 U. S. 1, 10, 14; *Adair vs. United*

States, 208 U. S. 161; *Lochner vs. New York*, 198 U. S. 45; *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746; *Muller vs. Oregon*, 208 U. S. 412, 421, within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."

Also the statement of this Court in *Coppage vs. Kansas*, 236 U. S. 1, at page 14:

> "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

And in *Adair vs. United States*, 208 U. S. 161, at pages 174, 175:

> "The right of a person to sell his labor upon such terms as he deems proper, is in its essence, the same as the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell."

Frisbie vs. United States, 157 U. S. 160, involved the power of Congress to limit an attorney's fee in the prosecution of a pension claim. It was distinctly stated in the opinion at page 166:

> "The pension granted by the government is a matter of bounty. No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *Walton vs. Cotton*, 19 How. 355. *United States vs. Teller*, 107 U. S. 64, 68.
>
> Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of Congressional Power. *United States vs. Hall*, 98 U. S. 343.

In *United States vs. Hall*, 98 U. S. 343, (see page 353), the ratio decidendi is similar to that of the *Frisbie* case..

Ball vs. Halsell, 161 U. S. 72, and also *Kendall vs. United States*, 7 Wall. 113 (see pages 116 and 118) deal with claims arising from Indian depradations. The source of these claims was not in a private contract with the Government nor a taking of property by the government. *The claims arose from treaty rights with the Indians.* The legislation by Congress was therefore an act of Sovereign grace, in the nature of a bounty, and

based purely upon the liberality of the United States. It further appeared that there was no appropriation to enforce the claim.

In contrast with that point, we refer the Court's attention to Section 20 of the Act of October 6th, 1917, which reads as follows:

"Sec. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of $23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director." (Italics ours.)

Calhoun vs. Massie, 253 U. S. 170, does not control the case at bar for several reasons. It does not appear from the facts that the Omnibus Claim Bill, considered there, was anything other than a moral, or gratuitous assumption by the government of a claim, where there was no legal obligation. There was further, as the majority opinion states, "special reasons" (see opinion of Mr. Justice Brandeis, at page 176) to the effect that no appropriation had been made by Congress. This was a distinguishing feature from the case at bar, because of Section 20 of the Act of October 6th, 1917, cited supra. Finally there was not under consideration in that case the meagre and paltry fee of $3.00, but an adequate and liberal sum of 20% of the recovery. The contrast between the 20% recov-

ery and the restriction to a total fee of $3.00, differentiates the ruling in *Calhoun vs. Massie* from the case at bar.

We also like to state to the Court that the citation of the Act of June 12th, 1917, in the foot note on page 174, in the opinion of Mr. Justice Brandeis, in so far as it is an indication of the constitutionality of certain generic enactments, is irrelevant in this case because, as we have seen, the Act of June 12th, 1917, dealt only with *compensation* and *payments in the nature of pensions*, and not with *contracts of insurance* discussed in the case at bar.

Bearing in mind the effort of an attorney in a case of this character, and the total lack of compensation in the case of unsuccessful endeavor, we may well justify a charge of $1,500.00 as an attorney's fee for the collection of a sum, which will amount in the aggregate, to the sum of $12,360.00. The charge made of $1,500.00 also included hotel bills, railroad fares, and disbursements of various descriptions.

We direct the attention of the Court to the well considered statement of this Court in *Taylor vs. Bemiss*, 110 U. S. 42, at page 45:

> "It was decided in the case of *Stanton vs. Embrey*, 93 U. S. 548, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims which are not within the ordinary course of procedure of the auditing officers of the government, justifies a liberal compensation in suc-

cessful cases, where none is to be received in case of failure.

Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights."

We respectfully submit that if this Legislation be adjudged to be constitutional, Congress is at once permitted, by one sweeping enactment, to prohibit absolutely or restrict to a nominal charge, the appearance of an attorney in any case in which the United States is a party, and for all professional services falling short of an actual judgment in a United States District Court. Congress is at once permitted to prohibit or restrict to a nominal fee an attorney from appearing in any proceeding ancillary to the main proceeding, in any State Court. Congress is at once permitted to prohibit or restrict to a nominal fee the appearance of any attorney, of a client who has a claim against the United States, before any Board, Commission, Department, or any other administrative tribunal in which the United States is a party. It means that in any dealing in which the United States is a party, whether the cause of action arises from contract with private individuals, dealings by the government in its proprietary or business function, or accruing to the claimant under a taking of property for just compensation by the United States, Congress has the constitutional power to enact that the United States of America may appear by its learned, skilled, and able officers, whereas the claimant must plead his own cause in propria persona, or be represented by an attorney at law, who is actuated by the sole

prospect of remuneration to the extent of a $3.00 fee, and who becomes a criminal if he accepts any sum in addition thereto, irrespective of any service rendered by him in behalf of client, pursuant to a contract with the client, if the service falls short of actual judgment in a trial in the United States District Court. Where a remedy has been granted by the Constitution and the Laws of the United States to enforce a claim against the Government, and a specific fund has been appropriated for the payment of such claims, an effective remedy against the United States includes the employment of trustworthy and reputable attorneys. To prohibit the employment of counsel is seriously and substantially to impair, if not to destroy, the enforcement of the remedy. To convict the attorney, retained by the client to prosecute the remedy, for accepting a fee, pursuant to an agreement between them, is a deprivation of liberty and property in violation of the petitioner's constitutional rights.

POINT XI.

THE OPINION OF THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUES THE STATUTE. THE STATEMENTS OF FACT IN THE OPINION THAT THE CLAIM WAS FOR COMPENSATION, ARE ERRONEOUS, AND ELIMINATE THE GRAVE QUESTIONS OF CONSTITUTIONALITY DISCUSSED IN POINT X.

At the outset, we should like to urge upon the Court that the Circuit Court of Appeals did not have the advantage of the decision of Judge Baker for its consideration. It is also obvious that the Court did not have the advantage of the consid-

eration of the Reports of the Committees before it. It was not argued in the briefs of either side, and apparently the Court did not have the aid of the view of the Committees' Reports. The meaning ascribed to the language of the Act that "payment to any attorney * * * for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3.00" does not survive the light of the Committee Reports, which emphatically state that that wording should only apply merely to the clerical work of the filling in of the form. In view of the Committe Reports (Point I), the opinion has its supports cut from under it.

We have also seen that the language "no * * * attorney shall be recognized in the presentation or adjudication of claims under Articles 2, 3 and 4" except upon a percentage recovery in case of suit, is not a criminal violation of law; but at most a lack of power to represent. (See Point III of our brief.) With respect to the policy of the statute stated in the opinion, S. P. 99:

> "The act established a system designed to be self-executing. It makes no difference how well or ill it works. With obvious jealousy of the mediation of agents or attorney, who might fleece the beneficiaries, it excluded them from any share in its operation except to draw up the simple papers. The system must get along without their help and if the beneficiaries suffer more than they would if they could employ attorneys with the risk of extortion, courts may not correct the blunder. To allow such charges as the defendant's for acting as a go-between would be exactly to frustrate the plan."

our answer is that Congress in enacting a criminal statute, should state its intention plainly, clearly, and in language which admits of no doubt; and that a criminal statute must be strictly construed, allowing the petitioner all the benefits of the doubts of vague and uncertain language.

The Courts should not attempt to add to the prohibitions of an Act, because certain other conduct might or should have been included.

Brandeis, J. in the case of *United States vs. Weitzel*, 246 U. S. 533, at page 543, uses the following illuminating language:

> "Statutes creating and defining crimes are not to be extended by intendment because the Court thinks the legislature should have made them more comprehensive."

We can trust our Judges and juries to distinguish between bona fide, honest, and useful services, and fictitious and colorable pretenses designed to circumvent the statute. The jury in this very case (as clearly indicated in S. P. 89) sought to distinguish between honest and fraudulent activity.

There is an erroneous statement of fact in the opinion:

> "The case in question fell under Article three, which deals with compensation for death, and the upshot of the language is, that no attorney shall be recognized in presenting claims unless there be a suit, but that he may be paid three dollars for preparing and executing any necessary papers" (S. P. 99).

The Court therefore regarded the case in the nature of a pension claim, and thus did not have

the grave constitutional question presented. The record shows, however, that the petitioner engaged in the investigation of a contract of insurance (S. P. 15), and not a claim for compensation or kind of pension. The summary disposal of the constitutional point, at S. P. 98, is as follows:

> "On the constitutional point we need say little. The War Risk Insurance Act established in substance a kind of pension, and Congress may impose upon any payments made under it such limitations as it chooses, *Frisbie vs. U. S.* 157 U. S. 160, 165, 166. *Ball vs. Halsell*, 161 U. S. 72. Indeed, such legislation may even avoid pre-existing contracts, *Calhoun vs. Massie*, 253 U. S. 170. The limitation in question was to protect from extortion a class of persons who might reasonably be thought subject to the practices of unscrupulous persons, and it was therefore well within the police power, even without the added power of Congress to appropriate the public moneys on such terms as it thinks best."

The grave question of constitutionality is thus eliminated, and not even presented for the consideration of the Court.

There has been brought to our attention, the case of *Welty vs. U. S.* Volume 2, Federal Reporter, Second Ed. No. 6, Advance Sheets, February 12th, 1925, page 562. That case was one which arose under the compensation article, and not the insurance article of the Act. The constitutional question was not even presented or considered. There is some *obiter dictum* in the opinion of the Court which, in so far as it may be implied to refer to contracts of insurance, is entirely in error. The

mere assertion is made in the opinion, without supporting reasoning, and without an attempt at elaborate treatment, that no other service than that prescribed by the $3.00 clause is allowed by the statute, and that any other service must be gratuitous. It is not necessary in this case to pass upon that question, but in so far as that language may be stretched to apply to a case arising under a contract of insurance, we respectfully submit that the Committee Reports, the canons of construction, the consideration and study of the history and circumstances of the enactment, the prohibited activity within the contemplation of Congress, show the error of the bald statement. It is, however, significant to note that with respect to the wording of the statute, the Court used the following striking language, at page 564:

> "It was vital that the jury be carefully instructed as to the sound interpretation of the Act and that a clear line of demarcation be drawn between what the law allowed and what it forbade. Such an interpretation was asked for by the defendant and was refused. The trial Judge was of the opinion that the language of the act spoke for itself and required no comment."

Apparently the Court was of the opinion that the wording of the Act could be elucidated by explanatory instructions from the trial Judge.

POINT XII.

THE OPINION OF JUDGE BAKER IN THE CASE OF UNITED STATES vs. RODGERS IS WELL CONSIDERED, SOUND, AND ANNOUNCES A RULE OF LAW WHICH IS SENSIBLE AND REASONABLE IN ITS APPLICATION.

(We have been informed by Decatur H. Rodgers, an attorney at law, of Martinsburg, West Virginia, the defendant in the case, that the following opinion was handed down by Judge William E. Baker in the District Court of the United States for the Northern District of West Virginia, and filed at Elkins, West Virginia, on or about the 14th day of November, 1922.)

UNITED STATES
vs.
D. H. RODGERS

BAKER, *J.*

"The motion before the Court at this time is to instruct the jury to return a verdict of not guilty. It is the duty of the Court to direct such a verdict if the evidence adduced by the government, supplemented by that offered by the defendant, fails to show that a crime has been committed.

There is no conflict in the evidence in this case on any material point. Three witnesses were produced by the government; certain documentary evidence, consisting of duly certified records from the Bureau of War Risk Insurance, have been offered, and the defendant has himself testified and produced certain correspondence, which it is unnecessary now to refer to in detail. As has been indicated

the government's evidence of the acts of the defendant which it is claimed constitute a crime is not controverted by him, and the question, therefore, is purely and entirely one of law which necessitates action by the Court.

The indictment is evidently framed under section 10264 of Barnes' Federal Code which is section 13 of the Act of October 6, 1917, as amended by the act of May 20, 1918. It charges that the defendant made a contract with Mrs. Tabler for the collection of a certain claim that she had against the Bureau of War Risk Insurance by reason of insurance on the life of her son, Duff Tabler, who died on February 6, 1919, under which contract Rodgers received an amount in excess of $3.00 for his services. The first count alleges the various amounts received by Rodgers under and by virtue of this contract, amounting in the aggregate to $80.50, and states that there was no disagreement between Mrs. Tabler and the Bureau of War Risk Insurance, and that no suit was brought in any district court for the collection of said claim. The second count charges substantially the same acts, in different language and names a different amount.

Two grounds are relied upon by the defendant in support of his motion as follows:

(a) That there is a fatal variance between the contract set up in the indictment and therein alleged to be unlawful and the contract proved by the government.

(b) Even if the indictment had charged specifically the contract proved and virtually admitted, still such contract does not violate the provisions of the statute above referred to.

(c) There can, I think, be little if any doubt that the contract testified to by the government's

witnesses differs materially from the one set up in the indictment. The substance of the contract as charged in the indictment I have already stated. The contract proved by the government's witnesses is not that Rodgers agreed on his part to collect this claim against the government, but that he was employed on the morning of February 6, 1919, for the purpose of having reinstated an insurance policy on the life of Tabler which had at the time actually, or was at the time by all parties supposed to have lapsed. Mrs. Tabler, her son and her husband admit that such was the contract, and it must necessarily have been so, because at the time the contract was made the insured was alive and, therefore, there could have been no claim whatever against the government which Rodgers could have been employed to collect. It is true that young Tabler was then on his death bed and that he died in less than ten hours after the contract was made. It is also true that at the time it was made he was known to be in a dying condition. That, however, does not affect the legal rights of the parties at the time of the making of the contract. All the evidence indicates not only the desirability but the imperative necessity that confronted the parties at the time to do immediately whatever was necessary to revitalize a policy that had died. All the evidence indicated, too, the then apparent impossibility of Mrs. Tabler, or any one else, succeeding in reviving this policy. It will be recalled that on December 19, 1918, Mrs. Tabler at the request of her son, who was then in bad health, or fearing a lapse of the policy, had written to the department to ascertain its status and to whom the premiums should be paid. She received no answer to this letter until January 27th, six weeks after she had written and about a week

before young Tabler died. The answer was utterly unsatisfactory and did not contain the needed information. If ever there was a necessity for prompt action and for the intervention of some one who knew what to do and how to do it, it was the occasion of Rodgers visiting Mrs. Tabler's house at her request. This state of facts, therefore, shows conclusively that it was for the purpose of having this policy reinstated that Rodgers was employed. That was the primary purpose; doubtless, all parties expecting the immediate dissolution of young Tabler, it was understood that Rodgers should also carry the case to its completion and collect the insurance. But that was incidental and secondary; it was not the primary purpose of his employment. Once the policy was reinstated there would probably be nothing else to do. The contract proved therefore differs materially from the contracts alleged and the motion of the defendant to instruct a verdict on this ground would have to be granted.

(b) But I do not think it is necessary to place my ruling in this case on the technical ground of a variance. I have given a great deal of thought to the proper construction of Section 10264 and have read in this connection Section 10257. In construing this statute the principles governing the construction of criminal statutes generally must control, and I find them nowhere better stated than in Lieber's Hermeneutics, page 297:

> "The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offences; but if by latitudin-

arian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offences; that before a man can be punished, his case must be plainly and unmistakably within the statute; and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. United States vs. Morris, 13 Pet. 464; United States vs. Wiltberger, 5 Wheat. 76; United States vs. Sheldon, 2 Wheat. 115."

"The plain rule of the common law is that no man shall be held to answer for any crime or offence until the same is fully and plainly, formally and substantially, made known to him, that he may have every advantage of previous notice in making his defence, both upon the matter of fact and of law."

* * *

"The rule that a penal statute is not to be extended by analogy to cases not within the letter,—or in our phrase, that there shall be no equitable extension of such a statute,—is recognized in all civilized nations, and is much insisted on by the civilians and canonists."

Bearing these principles in mind it is clear that the things done by Rodgers; that the contract entered into between him and Mrs. Tabler; that the receipt by him as compensation for his services of the various sums of money charged and admitted do not come within the inhibition of any Federal Statute.

Some doubt may exist as to whether Section 10257 or Section 10264 applies to this case. A careful reading, however, of Section 10257 and Section 10263 indicates the inapplicability of that section, and if there is any Federal statute forbidding the acts charged in the indictment it must be Section 10264, and it is, therefore, necessary to consider carefully the scope, the meaning and the purposes of that section.

It is contended by the government that in only two cases are attorneys authorized to charge or receive fees in connection with their services in collecting claims against the Bureau of War Risk Insurance. They are, according to the government's contention: (1) a charge of $3.00 for "such assistance as may be required in the preparation and execution of the necessary papers"; and (2) where there is a disagreement between the beneficiary and the bureau and a suit is brought and judgment rendered. In the latter case it becomes the duty of the trial Judge to ascertain and fix by an order, as a part of his judgment, a reasonable compensation for prosecuting the suit not to exceed five per cent. The government contends that in no other case; under no other conceivable conditions; and for no other services than those two cases is an attorney entitled to charge or receive any compensation, and that in those two cases he cannot receive a greater compensation than the amounts specified. With the latter contention, I agree, but I can-

not bring myself to the conclusion that Congress intended any such result as to the cases not specifically enumerated therein. Certainly the language of the first paragraph of Section 10264 does not so indicate.

But, says the government, the last paragraph in plain terms forbids it. The language of the last paragraph is "Any person who shall directly or indirectly solicit, contract for, charge or receive, or who shall attempt to solicit, contract for, charge or receive any fee or compensation, *except as herein provided* shall be guilty," etc. The government says that by this language Congress has forbidden any charge whatever except in the two cases indicated.

If we take this paragraph literally, (assuming it to be constitutional) and give full effect to the construction contended for by the government, Congress has forbidden any and all attorneys' charges in any and every conceivable case except the two referred to. This of course is absurd, and it will then be contended that as this paragraph is in the statute relating to War Risk Insurance, its scope is to be understood only as limiting charges for the collection of War Risk Insurance claims. The answer is that the statute itself does not so state. It does not say that no person shall "directly or indirectly solicit, contract for, charge or receive * * * any fee or compensation for services in the *collection of claims against the Bureau of War Risk Insurance* except as herein provided"; and to give it that effect we must read into the paragraph something that is not there. This is a criminal statute; it must be strictly construed. There is no such thing as a statutory crime unless the acts constituting it are specifically stated in the statute and punishment is prescribed. I cannot find in this

statute anything indicating an intention on the part of Congress to forbid charges except in the two cases above specified. The only thing forbidden by this statute is a charge for the particular services therein specified in excess of the limitations therein fixed.

It is enlightening to contrast the language of section 10264 with the language of 10257. In the latter statute the language is clear. It says "no claim agent or attorney shall be entitled to receive *any compensation whatever for services in the collection of claims* against the Bureau of War Risk Insurance," etc. If Congress had intended a similar inhibition in 10264 it is certain that it would have used the same similar, or other apt language. It is noteworthy that 10257 was on the statute book when 10264 in its present form was added. The statute limiting charges of attorneys for services in connection with the collection of pensions (8498 of Barnes' Code) contains language very similar to that contained in 10257. The language of Section 8489 is "no agent, attorney, or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act, shall directly or indirectly contract for, demand, receive, or retain for such services in preparing, presenting or prosecuting such claim a sum greater than $10.00," etc. In *United States vs. Frisbie*, 157 U. S. this statute is construed and applied. One has only to read 8489 and 10257 and contrast them with 10264 to conclude that the intention of Congress in the former sections was altogether different from the intention of Congress in 10264.

But I do not think it necessary to base my conclusion in this case solely on technical rules of construction, even though such technical rules make irresistible the conclusion I have reached. I can-

not conceive that Congress; doubtless anticipating the thousands and thousands of cases that would arise under this War Risk Insurance Act; foreseeing that infinite complications would be inevitable; realizing the utter helplesness in many cases of the beneficiaries and the imperative need that they would or might have for persons trained as lawyers are trained, and skilled as lawyers are skilled; that the Congress of the United States would not only so hamper beneficiaries but would for all practical purposes deny to them the services of attorneys by making it unlawful for them to agree to pay their attorneys a greater compensation than $3.00 no matter how great their labor; no matter how difficult the services rendered; no matter how many personal visits to the bureau were necessary; no matter how successful their efforts. If it be contended that this statute was enacted to protect beneficiaries from excessive charges by unscrupulous attorneys, a moment's reflection will convince that the evils that would result from such a construction are infinitely greater than the evils that that same construction would inhibit.

The constitutionality of the limitations on attorneys' charges, if the construction of 10264 contended for by the government is adopted, is challenged by the defendant; but the conclusions I have reached on other grounds make it unnecessary to consider or to determine its constitutionality.

Having these views I feel constrained to instruct the jury to return a verdict of not guilty."

POINT XIII.

FOR THE REASONS STATED THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS, AFFIRMING THE CONVICTION OF THE PETITIONER, SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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